United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 21-0493**
	)	**Issued: March 4, 2022**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Seattle, WA, Employer	)	

Appearances:
Stephanie Leet, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On February 15, 2021 appellant, through counsel, filed a timely appeal from a December 17, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that, following the December 17, 2020 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure*s provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal.

ISSUE

The issue is whether appellant has met his burden of proof to expand the acceptance of his claim to include additional conditions as causally related to the accepted January 1, 2005 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 22, 2005 appellant, then a 65-year-old lead screener, filed a notice of recurrence (Form CA-2a) alleging that on January 1, 2005 he experienced a recurrence of a previously accepted cervical spine condition.[5] He stopped work on February 12, 2005 and did not return. OWCP developed the claim as one for a new occupational disease (Form CA-2). On May 5, 2005 it accepted a lumbar strain, cervical thoracic strain, and lumbar radiculopathy. On July 27, 2005 OWCP expanded its acceptance of the claim to include the additional diagnosis of an L4-5 disc herniation.

On August 29, 2005 appellant underwent an OWCP-authorized laminectomy, facetectomy, and foraminotomy at L4 and L5. OWCP paid wage-loss compensation. It placed appellant on the periodic rolls, effective February 19, 2006.

Appellant underwent a series of OWCP-authorized cervical facet block and cervical epidural injections from January 12 through July 18, 2007, and lumbar epidural steroid injections on August 28, 2007.[6] From December 30, 2014 through January 23, 2017, he also underwent a series of OWCP-authorized bilateral L3, L4, and L5 medial branch and dorsal ramus blocks, OWCP-authorized bilateral radiofrequency ablation from L3 through L5, and OWCP-authorized caudal and bilateral L4-5 transforaminal epidural steroid injections.

On May 30, 2017 OWCP obtained a second opinion regarding appellant's work capacity and the etiology of his continuing condition from Dr. Vicki Kalen, a Board-certified orthopedic surgeon. In a June 21, 2017 report, Dr. Kalen opined that multilevel degenerative disc changes visible on imaging studies were normal for appellant's age, and that surgery had resolved the accepted L4-5 disc herniation. She found that the accepted employment injuries had resolved

[4] Docket No. 17-1423 (issued November 8, 2017).

[5] Appellant has a previously accepted traumatic injury claim under OWCP File No. xxxxxx865 for a cervical strain. OWCP administratively combined OWCP File Nos. xxxxxx840 and xxxxxx865, with OWCP File No. xxxxxx840 serving as the master file.

[6] A January 23, 2006 cervical magnetic resonance imaging (MRI) scan demonstrated disc narrowing at C4-5, C5-6, and C6-7 with degenerative disc bulges. A June 3, 2008 lumbar MRI scan demonstrated bilateral posterior laminectomies at L4-5 with 5 millimeter (mm) anterolisthesis of L4 on L5, increased since a March 4, 2005 study, resulting in bilateral neural foraminal narrowing, with possible compression of the left exiting L4 nerve root, a posterior osteophyte at L5-S1 contributing to moderate bilateral neural foraminal narrowing with contact of the exiting L5 nerve roots bilaterally, mildly increased posterior disc bulge at L2-3 with mild spinal canal and neural foraminal narrowing, and moderate-to-severe facet arthropathy at L4-5. June 3, 2008 lumbar x-rays demonstrated a Grade 1 anterolisthesis of L4 on L5 with instability, and prominent degenerative disc disease present at L5-S1.

without residuals. In a July 10, 2017 supplemental report, Dr. Kalen noted work restrictions related to appellant's age of 78 and age-related spinal complaints, unrelated to the employment injury.

In a July 20, 2017 report, Dr. Russel R. Kinder, Board-certified in anesthesiology and pain medicine, diagnosed a sprain of the ligaments of the cervical and lumbar spine. On September 6, 2017 he performed OWCP-authorized bilateral transforaminal epidural steroid injections at L4-5. Dr. Kinder diagnosed lumbar radiculopathy.[7]

On March 6, 2018 OWCP found a conflict of medical opinion between Dr. Kalen, for the government, and Dr. Kinder, for appellant, regarding the relationship of appellant's continuing condition to the employment injury. To resolve the conflict, on March 20, 2018 OWCP referred appellant for an impartial medical examination with Dr. Lowell Anderson, a Board-certified orthopedic surgeon. In an April 18, 2018 report, Dr. Anderson, serving as the impartial medical examiner (IME), reviewed appellant's history of injury, medical records, and the statement of accepted facts (SOAF). On examination, he observed restricted range of motion of the cervical spine, paraspinal tenderness to palpation of the cervical spine, left intrascapular region, and lumbosacral junction, possible mild weakness of the left lower extremity evident on toe-raise and step testing, possible mild hamstring weakness in the left lower extremity, subjective decreased sensation in the second, third, and fourth fingers of the left hand, minimally decreased sensation in the fifth finger of the left hand, limited lumbar range of motion, decreased sensation in the entire left lower extremity, and negative seated straight leg raising tests bilaterally. Dr. Anderson also noted that thigh circumference at 10 centimeters proximal to the patella was 51/49, right over left. He diagnosed multilevel cervical spondylosis, cervical spinal stenosis, likely left upper extremity radiculopathy symptoms related to nerve root irritation at multiple levels of the cervical spine, central cervical stenosis related to genetic and age-related progression of a preexisting cervical condition. Dr. Anderson opined that the accepted injury "with likely L4-5 herniated disc" and surgery had resolved without residuals as it was "likely satisfactorily treated" by surgery. He noted that appellant's ongoing cervical and lumbar conditions were due only to age-related degenerative changes. Dr. Anderson indicated that appellant had attained maximum medical improvement "many years ago." He found appellant unable to perform his date-of-injury position due to nonoccupational, age-related degenerative changes of the cervical and lumbar spine.

On May 9, 2018 OWCP proposed to terminate appellant's wage-loss compensation as he was no longer disabled from work as a result of the accepted January 1, 2005 injuries, based on Dr. Anderson's opinion as the IME. It afforded him 30 days to respond.

In a letter dated June 6, 2018 appellant, through counsel, contended that Dr. Anderson failed to differentiate between sequelae of the employment injury and age-related degenerative changes. Appellant submitted a June 1, 2018 report by Dr. Xi Tian, Board-certified in anesthesiology and pain medicine, diagnosing a ligamentous cervical spine sprain and chronic postoperative pain.

By decision dated June 14, 2018, OWCP terminated appellant's wage-loss compensation, effective that day, based on the special weight accorded Dr. Anderson's report as the impartial

[7] A December 6, 2017 MRI scan of the cervical spine demonstrated moderate-to-severe spondylosis at C5-6, C6-7, and C7-T1 with spinal stenosis, multiple areas of facet arthrosis, and neuroforaminal narrowing.

medical examiner. It noted that the decision did not affect appellant's entitlement to medical benefits.

On June 19, 2018 OWCP received a June 7, 2018 report by Dr. Tian, diagnosing a sprain of ligaments of cervical spine.

In a June 22, 2018 report, Dr. Richard Wohns, a Board-certified neurosurgeon, noted the accepted January 1, 2005 occupational injury and diagnosed cervical stenosis, cervical radiculopathy, cervical pain, bilateral occipital neuralgia, and low back pain.[8] He opined that the January 1, 2005 employment aggravated or activated these latent, asymptomatic conditions.[9]

On July 3, 2018 appellant requested a telephonic oral hearing before a representative of OWCP's Branch of Hearings and Review, held November 14, 2018.

In a December 11, 2018 letter, counsel asserted that OWCP should expand its acceptance of the claim to include an L5-S1 disc herniation, lumbar stenosis, and failed back syndrome. Appellant submitted additional evidence.

By decision dated January 29, 2019, an OWCP hearing representative affirmed the June 14, 2018 termination decision.

On February 11, 2019 OWCP received a November 1, 2018 report by Dr. Wohns, in which he opined that appellant's cervical and lumbar conditions were caused by repetitive flexion and extension of the upper and lower body while lifting and throwing heavy luggage at work on January 1, 2005. Dr. Wohns explained that appellant's accepted lumbar sprain, cervical-thoracic sprain, herniated L4-5 disc, and lumbar radiculitis had naturally progressed over time subsequent to a failed L4-5 laminectomy. He listed additional diagnoses of cervical stenosis, cervical radiculopathy, and bilateral occipital neuralgia.[10]

On April 11, 2019 OWCP received a November 15, 2018 report by Dr. Tian, diagnosing lumbago, other chronic postoperative pain, and a ligamentous lumbar sprain.

[8] A July 11, 2018 MRI scan of the lumbar spine demonstrated central stenosis at L2-3 with broad-based central protrusion, L3-4 central stenosis with broad-based bulging, small central canal, and left foraminal and central disc protrusion, degenerative spondylosis at L4-5 with marked narrowing of the right nerve root and marked flattening of the existing L4 nerve, L5-S1 broad-based disc bulging and retrolisthesis with bilateral neuroforaminal narrowing, and right S1 nerve root displacement.

[9] Appellant consulted several other physicians in 2018 and 2019. In an October 25, 2018 report, Dr. David Hoffman, a Board-certified family practitioner, referred him to a pain management clinic. In a January 10, 2019 report, Dr. Darin Blackburn, a Board-certified family practitioner, noted treating appellant since the January 1, 2005 employment injury. He opined that appellant's injury-related cervical and lumbar spine symptoms had not resolved and necessitated work limitations. In reports dated January 25 and April 10, 2019, Dr. Michael J. Martin, a Board-certified orthopedic surgeon, noted a history of the accepted January 1, 2005 employment injury and subsequent treatment. On examination he noted slightly diminished cervical and lumbar lordosis, and limited range of cervical and lumbar spine motion. Dr. Martin recommended physical therapy.

[10] A March 8, 2019 MRI scan of the cervical spine and April 9, 2019 MRI scans of the thoracic and lumbar spine demonstrated degenerative changes throughout the spine as evident on prior imaging studies. The April 9, 2019 lumbar MRI scan demonstrated a midline laminectomy with excellent decompression of the spinal canal at L4-5 and L5-S1.

In July 1, 2019 and January 8, 2020 reports, Dr. Wohns opined that appellant required a C5-6 and C6-7 anterior cervical discectomy and fusion, and extension of the prior lumbar laminectomy to include L2 and L3 due to severe lumbar stenosis.

On January 16, 2020 appellant, through counsel, requested reconsideration of the January 29, 2019 decision.

In a January 21, 2020 report, Dr. Wohns noted that the January 1, 2005 L4-5 laminectomy had relieved appellant's bilateral lower extremity radiculopathy, but that sharp, persistent lumbar pain remained. He diagnosed bilateral occipital neuralgia, cervical radiculopathy, cervical stenosis, cervical pain, lumbar stenosis with neurogenic claudication, mid back pain, and low back pain.[11]

By decision dated January 29, 2020, OWCP denied modification of the prior decision.[12]

In a February 4, 2020 report, Dr. Wohns diagnosed cervical stenosis of the spinal canal, lumbar stenosis with neurogenic claudication, and mid-back pain. He ordered a cervical MRI scan.

A June 25, 2020 MRI scan of the cervical spine demonstrated left C2-3 facet arthropathy, a mild C3-4 disc protrusion with facet arthropathy and bilateral bony foraminal stenosis, possible partial bony fusion of the endplates and right facets at C4-5 with mild bony stenosis of the right foramen, degenerative disc narrowing at C5-6 with posterior disc protrusion and central canal narrowing, partial desiccation of the C6-7 disc with diffuse posterior disc protrusion and central canal narrowing, and mild anterolisthesis of C7 on T1 with mild posterior disc protrusion and facet arthropathy.

In a July 20, 2020 report, Dr. Wohns opined that the June 25, 2020 MRI scan demonstrated the need for a C5-6 andC6-7 microdiscectomy and fusion, to be followed by L2 to L4 laminectomies and foraminotomies.

In an August 13, 2020 letter, counsel requested that OWCP expand its acceptance of appellant's claim to include additional conditions as noted by Dr. Wohns. She submitted August 4 and November 17, 2020 letters by Dr. Wohns, who related appellant's account that the January 5, 2005 employment incident caused the sudden onset of excruciating "electric shock-like pain" throughout his neck and back, radiating into his head and all extremities. Dr. Wohns explained that the employment injury caused a herniated lumbar disc "due to a mechanical strain between two vertebrae, as he twisted to throw the luggage." He opined that the employment incident also caused spondylosis and radiculopathy at C5-6, C6-7, and C7-T1 due to strain in his spine "and shoulder as he twisted to throw the heavy luggage." Dr. Wohns reiterated that the January 5, 2005 employment injury directly caused or aggravated preexisting cervical stenosis of the spinal canal, cervical radiculopathy, cervical pain, bilateral occipital neuralgia, and low back pain.

[11] In a January 17, 2020 report, Dr. Kathy Wang, an osteopathic physician Board-certified in anesthesiology, administered a discogram with provocative lumbar discography at L2-3, L3-4, and L5-S1, which demonstrated nonconcordant pain at L2-3, L3-4, and L4-5.

[12] On July 27, 2020 appellant, through counsel, appealed the January 29, 2020 merit decision to the Board. By decision dated February 9, 2022, the Board reversed the January 29, 2020 decision, finding that IME Dr. Anderson's report was inconsistent with the SOAF. Docket No. 20-1442 (issued February 9, 2022).

On November 17, 2020 OWCP referred the medical record and SOAF to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as OWCP's district medical adviser, for an opinion on whether the accepted employment injury caused additional conditions. Dr. Katz submitted a November 19, 2020 report in which he reviewed the medical record and SOAF. He disagreed with Dr. Wohns' support for causal relationship, as appellant's cervical spine conditions were present prior to a January 23, 2006 MRI scan, and the accepted cervical spine sprain was a self-limiting condition. Dr. Katz opined that appellant's cervical spondylosis, cervical stenosis, and bilateral occipital neuralgia were due to the aging process and "natural history of the degenerative conditions of the cervical spine" rather than a neck sprain. He commented that the proposed diagnosis of low back pain was vague, and duplicative of the accepted lumbar conditions, which were known to produce low back pain.

By decision dated December 17, 2020, OWCP denied expansion of the claim to include additional conditions, as they appeared to be preexisting or degenerative in nature, unrelated to the accepted January 1, 2005 employment injury. It accorded the weight of the medical evidence to the opinion of Dr. Katz.

LEGAL PRECEDENT

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[13]

To establish causal relationship, the employee must submit rationalized medical opinion evidence.[14] The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the accepted employment injury.[15] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[16]

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[17] When there are opposing reports of virtually

[13] *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[14] *E.W.*, Docket No. 20-0338 (issued October 9, 2020).

[15] *L.P.*, Docket No. 20-0609 (issued October 15, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

[16] *C.L.*, 20-0213 (issued September 15, 2021); *J.L.*, Docket No. 20-0717 (issued October 15, 2020); *James Mack*, 43 ECAB 321 (1991).

[17] 5 U.S.C. § 8123(a); *D.B.*, Docket No. 19-0663 (issued August 27, 2020); *L.T.*, Docket No. 18-0797 (issued March 14, 2019); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[18]

ANALYSIS

The Board finds that this case is not in posture for decision.

In support of his request for claim expansion, appellant submitted reports dated June 22, 2018 through November 17, 2020 by Dr. Wohns. In a June 22, 2018 report, Dr. Wohns opined that the January 1, 2005 employment injury aggravated or activated latent cervical stenosis, cervical radiculopathy, cervical pain, bilateral occipital neuralgia, and low back pain. He indicated, in July 1, 2019, January 8, 2020 and July 20, 2020 reports, that sequelae of the January 1, 2005 injury required C5-6 and C6-7 anterior discectomy and fusion, and extension of a prior lumbar laminectomy to L2-3. Dr. Wohns explained in his August 3, 2020 letter that repetitive flexion and extension of the upper and lower body while lifting and throwing heavy luggage at work on January 1, 2005 caused the additional cervical and lumbar conditions. In his November 17, 2020 letter, he attributed C5-6, C6-7, and C7-T1 radiculopathy to a strain in appellant's spine and shoulder as he twisted to throw heavy luggage on January 5, 2005.

In a November 19, 2020 report, Dr. Katz advised that Dr. Wohns' reports failed to support a causal relationship between the January 1, 2005 employment injury and cervical spondylosis, cervical stenosis, and bilateral occipital neuralgia. He opined that these diagnoses were preexisting conditions unrelated to the January 1, 2005 employment injury, and that the diagnosis of low back pain was vague and duplicative.

As noted above, if there is a disagreement between an employee's physician and an OWCP referral physician, OWCP will appoint an impartial medical specialist who shall make an examination.[19] The Board finds that a conflict exists between the appellant's treating physician, Dr. Wohns, and the DMA, Dr. Katz, regarding whether the claim should be expanded to include additional cervical conditions.

Therefore, the case must be remanded to OWCP for referral of appellant to an impartial medical specialist for resolution of the conflict in medical opinion evidence in accordance with 5 U.S.C. § 8123(a).[20] After this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

[18] *D.B.*, *id*., *D.W.*, Docket No. 18-0123 (issued October 4, 2018).

[19] *A.R.*, Docket No. 19-1204 (issued February 25, 2021); *see S.S.*, Docket No. 19-1658 (issued November 12, 2020); *C.S.*, Docket No. 19-0731 (issued August 22, 2019).

[20] *A.R.*, *id*.; *S.M.*, Docket No. 19-0397 (issued August 7, 2019).

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 4, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board